No. 13012.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

UNITED STATES OF AMERICA and ELEUTERIA BROWN ARENAS, also known as DELLA NICHOLSON,

Appellees.

Appeal from the United States District Court for the Southern District of California

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REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

Statement.

Appellees contend (1) that "Appellee (Eleuteria Brown Arenas) is not bound by the judgment in No. 1321;" (2) that "The district court had no power to determine the heirs of Guadaloupe;" and (3) that "The decision of the Secretary of the Interior that appellee (Eleuteria) is heir of Guadaloupe Arenas may not be reviewed by the courts." All of these questions are discussed in appellant's opening brief. In view of the position taken by appellees, however, further discussion is necessary.

ARGUMENT.

I.

The United States Is Bound by the Former Judgment.

The United States does not claim that it is not bound by the judgment in Case No. 1321. It claims only that Eleuteria Brown Arenas is not bound by said judgment, because she was not a party to the suit wherein it was rendered.

If the United States is bound by said judgment, as tacitly conceded, then its officers and agents are also bound thereby. The Secretary of the Interior, as an officer of the Government, is bound by that judgment; and, therefore, he was without right to make determinations of heirship contrary thereto. The judgment in Case No. 1321 is a valid and binding judgment against the United States. (See authorities cited in the Opening Brief, pages 11-16.) Moreover, the attack now made by the United States on said judgment is a collateral attack not permitted under well settled rules of law. (See Op. Br. pp. 16-20.)

It is immaterial whether or not Eleuteria is bound by the former judgment. The record in this case shows affirmatively, and beyond any question, that she was not the natural, or the adopted, daughter of Guadaloupe Arenas, hence was not an heir of Guadaloupe. [See Defendants' Exhibit "A."]

II.

The District Court Had Power to Determine That Lee Arenas Was the Sole Heir of Guadaloupe.

Appellees disregard the fact that the adjudication in the former judgment, namely, that Lee Arenas was the sole heir of Guadaloupe, was incidental, but necessary, to a judicial determination of his right to the lands selected by her for allotment. They also ignore the point made by appellant (Op. Br. p. 30) that the authority of the Secretary of the Interior to determine heirship is limited to cases where an allotment was made and a trust patent was issued to the Indian during his, or her, lifetime and who died during the trust period. We submit that the proper distinction between an ordinary heirship proceeding, where the Secretary has exclusive jurisdiction, and that involved herein was made by this Court in *Gerard v. United States,* 167 F. 2d 951, 953, and in the other cases cited in the opening brief, pages 33-35.

The position taken by the United States, if sustained, would lead to the illogical conclusion that a court of equity having jurisdiction of the parties and of the subject matter of the suit cannot decide questions which necessarily arise in the cause, that is. questions necessary to a decision. This is not and has never been the law in the United States. For more than a century it has been settled law "that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause." (*Peck v. Jenness,* 48 U. S. 612, 12 L. Ed. 841. See other cases cited, to like effect, at pp. 11-15, Op. Br.)

III.

The Determination of Heirship by the Secretary of the Interior May Be Reviewed by the Courts Because of Fraud, or for Error of Law Upon the Facts Found, or Where There Is No Evidence to Support the Determination.

The Examiner of Inheritance is appointed by and acts for the Secretary of the Interior in matters pertaining to Indian heirship. His act is the act of the Secretary. Neither is sacrosanct.

Appellees have advanced the customary departmental contention that appellant has not exhausted the administrative remedy of appeal from the determination of the Examiner of Inheritance, hence, they say in effect that the absolute invalidity of that determination cannot now be challenged. No such conclusion is justified by the facts and the law of this case.

The Act of June 25, 1910, as amended (28 U. S. C. A., Section 372) provides:

> "When any Indian to whom an allotment of land has been made * * * dies before the expiration of trust period * * * the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

Any determination of heirship made under this statute is, and of necessity must be, the act of the Secretary. The Act does not provide for any appeal from his determination; on the contrary, it is made final and conclusive.

If the Secretary chooses to act through a subordinate, or agent, as was done in this case, the act of such sub-

ordinate, or agent, is the act of the Secretary. It is begging the question to say that an appeal must be taken from the agent's action, notwithstanding the fact that the Act makes no provision or requirement for an appeal.

The cases cited by appellees are not in point. In each such case the aggrieved party had a statutory right and duty to appeal. No such right or duty exists here.

Appellees assert that as long as the United States holds an allotment in trust the courts have no power to question the administration thereof by the Secretary of the Interior. They then say "his determination of the heirs is * * * 'final and conclusive'." They ignore the cases holding that

> "his decision upon the issue of heirship * * * may undoubtedly be avoided by a suit in a court of equity on account of fraud which induced it, on account of error of law upon facts found, conceded, or established beyond dispute at the hearing before him, or on the ground that at the close of such hearing there was no evidence to support his finding on a material issue of fact which controlled the result."
>
> *Dixon v. Cox,* 268 Fed. 285, 289-290.

See, also, other cases cited in Opening Brief, pages 28-29, to the same effect.

In the instant case the order of the Examiner of Inheritance determining that Eleuteria was adopted by Guadaloupe is challenged. [Tr. p. 7, lines 1-17.] In the Opening Brief, pages 22-28, it is shown that there is no evidence showing, or tending to show, that Guadaloupe adopted Eleuteria under the laws of the State of California or in accordance with Indian tribal custom. All of the affirmative and positive evidence shows that there was no tribal custom in respect to adoption of a minor by a

member of the Palm Springs Band, and that Guadaloupe never intended to adopt and did not adopt Eleuteria. [See Defendants' Exhibit "A," and Op. Br. pp. 26-27.]

There can be no doubt that the Examiner erred in his holding that Guadaloupe adopted Eleuteria in accordance with established, or any, Indian tribal custom. It is equally certain that he erred in holding that Eleuteria was an heir of Guadaloupe "in accordance with the laws of the State of California." Since Eleuteria was not related by blood to Guadaloupe, the Examiner's conclusion that she was an heir must rest solely upon the alleged adoption. If there was no adoption, then Eleuteria could not be an heir of Guadaloupe.

The record [Exhibit "A"] negatives the claim of adoption. The determination that Eleuteria was adopted by Guadaloupe has no support in the evidence, and for that reason it may and should be held invalid by the courts. The so-called exclusive jurisdiction of the Secretary does not preclude judicial review of a determination of heirship that rests on fraud or error of law under the facts, or where it is not supported by the facts. At least two of these grounds exist in this case.

The judgment should be reversed.

Respectfully submitted,

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